IN THE HIGH COURT OF JUDICATURE AT MADRAS
Date : 2.9.2006

Coram

THE HONOURABLE MR.JUSTICE R. BALASUBRAMANIAN
AND
THE HONOURABLE MR. JUSTICE V. DHANAPALAN

CRIMINAL APPEAL No.1159 OF 2004

Rajesh @ Raj Kumar @ Rajesh Kanna ..Appellant/Accused

-Vs.-

State rep.by
Inspector of Police
K.1, Sembium Police Station
Chennai. ..Respondent/Complainant

Appeal against the judgment dated 5.2.2004 made in S.C.No.287 of 2002 of on the file of Addl.District and Sessions Judge, Fast Track Court No.V, Chennai.

For Appellant : Mr.A.S.Chakravarthy

For Respondent : Mr. N.R.Elango, APP

J U D G M E N T

(Judgment of the Court was delivered by R. Balasubramanian, J)

The appellant stands convicted in S.C.No.287 of 2002 for offences under Sections 363 and 364A I.P.C., for which he stands sentenced to undergo five years rigourous imprisonment together with a fine of Rs.2,000/- carrying a default sentence for the former offence and to undergo imprisonment for life together with a fine of Rs.3,000/- carrying a default sentence for the later offence. The sentences are directed to run concurrently. Hence he is before this court in this appeal. Heard Mr.A.S.Chakravarthy, learned counsel for the appellant and Mr.N.R.Elango, learned Additional Public Prosecutor for the State.

2.The prosecution case is that on 20.3.2001 at about 12.15 p.m. the accused kidnapped a male child Kirankumar aged about 2 1/2 years from his father/P.W.1 and in the course of the same transaction demanded a ransom of Rs.50,000/- from P.W.1 for release of the child and therefore punishable for the offences referred to earlier. In all, the prosecution examined P.Ws.1 to 13 and marked Exs.P.1 to P.11 and M.Os.1 to 3. The defence neither brought in any oral nor documentary evidence. P.W.1 is the father of the child, who had been kidnapped. P.W.1 was having a laboratory as well

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as Fast Food shop in the ground floor of the premises, in which he is living in the upstairs. The accused responded to his advertisement and got appointed as a cook in the Fast Food Restaurant. The accused was residing in a small portion behind his house itself. The accused gained the confidence of P.W.1 by turning out good work. On 17.3.2001, stating that his mother is ailing and therefore he must go to Madurai, by taking a sum of Rs.7,000/- he left the place. He came back at 9.00 a.m. on 20.3.2001 and started working. At about 12 noon he took Kirankumar stating that he would get him some biscuits. The accused and the child did not return. Therefore P.W.1 and his other employees started searching. Till 5.30 p.m. on that day, neither the child nor the accused could be located. At 6.00 p.m. P.W.1 gave a complaint to the police, which is Ex.P.1. On 2.4.2001 at 11.00 a.m. the accused telephoned to P.W.1 and stating that the child is with him, disconnected the telephone. At 11.00 p.m. on that day, the accused telephoned again and wanted a sum of Rs.50,000/- to meet his urgent needs and assured to hand over the child, if payment is made. The accused promised to disclose the place where the money is to be brought. At 1.00 p.m. on 7.4.2001 the accused telephoned once again and told P.W.1 that he must send the money through driver Nagaraj and send him in an Ambulance Van to the Fort at Vellore and the money must reach him between 5.00 to 6.00 p.m. on that day. Immediately P.W.1 passed on that information to the police. Money was taken by Nagaraj and police followed him secretly. Police informed him that the accused had been arrested. It appears that when the police examined the accused, he told them that he left the child near the Museum in the Tajmahal, Agra. The Commissioner of Police, Union Territory of Delhi was informed and P.W.1 flew to Delhi. Reaching the police out post at Taj Mahal,Agra, they enquired and the police officer sent for P.W.10, the photographer-cum- guide. P.W.1 then found that his child was with him. P.W.1 brought the child back to Chennai; produced it in court and then took custody of the child.

3. P.W.11 is the Sub Inspector of Police, Law and Order, before whom at 6.00 p.m. on 20.3.2001 P.W.1 appeared and gave the complaint. He registered that as Ex.P.1 in Crime No.455 of 2001 for the offence under Section 363 I.P.C. He prepared Ex.P.2, the Observation Mahazar and Ex.P.3, the rough sketch. He examined witnesses and recorded their statements. Having regard to the gravity of the offence committed, he handed over the investigation to the Inspector of Police. When he was in Delhi, he was contacted by the Inspector of Police on 7.4.2001 informing him that the accused had been arrested and the child is shown to have been abandoned in Taj Mahal complex at Agra on 31.3.2001. On 8.4.2001 along with P.W.1 he went to Taj Mahal Complex and secured the child. P.W.12 is the Inspector of Police, Law and Order during the relevant time in the investigating police station. Anbazhagan, the Sub Inspector of Police, Law and Order had registered the complaint given by P.W.1 as Ex.P.1 in Crime No.455 of 2001 for the offence under section 363 I.P.C. Ex.P.6 is the printed First Information Report prepared by him. After making the preliminary enquiry, the Sub Inspector of Police placed the papers before P.W.12 and accordingly he commenced the investigation. As per orders of the Commissioner of

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Police, Chennai, special teams were constituted on 21.3.2001 to locate the child. P.W.12 examined witnesses by recording their statements. P.W.12 observed the premises from where the child was kidnapped. He examined the witnesses and since they have repeated what they have already told to the Sub Inspector of Police Anbazhagan he did not record their statements again. Exs.P.2 and P.3 are the Observation Mahazar and Rough Sketch already prepared by the Sub Inspector of Police Anbazhagan. P.W.1 informed P.W.12 that he received a telephone call on 7.4.2001 from the accused demanding a ransom of Rs.50,000/- to be sent through driver Nagaraj in the Ambulance before 6.00 p.m. on that day to the Fort at Vellore. Immediately P.W.12 altered the Section of offence from one under Section 363 I.P.C. into one under Section 364 A I.P.C. and sent the altered First Information Report to V Metropolitan Magistrate, Chennai. Ex.P.7 is the said report. P.W.12 constituted a special team; sent Nagaraj - the driver of P.W.1 with a sum of Rs.50,000/- and the said team followed him. At 6.00 p.m. Nagaraj reached the Fort at Vellore and when the accused came to meet Nagaraj, P.W.12 apprehended him and examined him in the presence of P.W.7 and another. At that time, the accused gave a voluntary confession statement, the admissible portion of which is Ex.P.8. The accused produced from his person the clothes worn by the child and the waist cord. M.O.2 is the collar less white banian and M.O.3 is the waist cord. M.O.1 is the trouser. They were recovered under Ex.P.9 in the presence of P.W.7 and another. P.W.7 deposed the above facts. The accused at that time disclosed that he had abandoned the child in Taj Mahal at Agra on 31.3.2001. P.W.12 contacted the police officials at Agra as well as the police out post in Taj Mahal and confirmed that a child was found abandoned in Taj Mahal premises. The Sub Inspector of Police, Anbazhagan was already in camping at Delhi in the course of investigation. P.W.12 accordingly contacted Anbazhagan and asked him to go out to Agra and get the child. Ahbazhagan reaching Agra found that, on the directions of the police officers, custody of the child was given to P.W.10, the photographer-cum-guide. Sub Inspector Anbazhagan secured the child and passed on that information to P.W.12.

4. P.W.2 is an employee under P.W.1. He would depose that the accused was working under P.W.1; he left for Madurai on 17.3.2001; came back on 20.3.2001 and by 12 noon he left the place taking Kirankumar to get some biscuits for him, stating that he had not brought anything for the child, when he came back from Madurai. P.W.2 saw the accused taking the child. Not finding the child, P.W.1 gave the complaint. In the month of April, P.W.1 received a phone call from the accused demanding a ransom of Rs.50,000/-. P.W.3 is working as the Cashier in P.W.1's shop. His evidence is on the same lines as spoken to by P.W.2. P.W.4 knows the accused as well as P.W.1 and the accused was working under P.W.1. His evidence also is on the same lines as spoken to by P.Ws.2 and 3. P.W.5 is working in the Laboratory run by P.W.1 as a part time employee. He witnessed the preparation of Ex.P.2, the Observation Mahazar and Ex.P.3, the Rough Sketch. P.W.6 is a Master Cook by profession and he knows the accused. In Hotel Tamizhagam, the Master Cook post fell vacant in the year 2000 and

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P.W.6 offered himself to work and they asked him to come two days later. The accused also offered to work in that hotel. But however he was denied employment. On his request to stay over night in that hotel P.W.6's employer permitted him to stay. Next day morning theft of gas stove was detected. A few months later, P.W.6 saw the accused working under P.W.1. P.W.8 is having a two wheeler service station in the road where P.W.1 is having his laboratory and fast food restaurant. His service Centre is opposite to P.W.1's shop and he knows the accused, who was working under P.W.1. On 7.4.2001 on his telephone number some one wanted him to call P.W.1 and accordingly he made P.W.1 to attend the call. After conversation, P.W.1 told P.W.8 that the accused is in Vellore and wants Rs.50,000/-.

5. P.W.9 during the relevant time was working as Inspector of Police, Law and Order in Agra. On 31.3.2001, he found a young boy abandoned near the museum at Taj Mahal. It was 7.00 p.m. As he was making his routine rounds after the closure of Taj Mahal on that evening, he noticed the abandoned child. He found the abandoned child on a bench sleeping. He brought the child outside and enquired persons available in the tourist buses about his identity. He also examined various photographers and guides at Taj Mahal to fix the identity of the child. He did not get any clue at all. Then he contacted his superiors through the control room. When he saw the child he found on him some blackened wounds. The photograph of the child was given in papers which made innumerable people making a claim. However P.W.9's superiors smelt some suspicion. Therefore they refused to hand over the child to any one of them. P.W.10, working as a guide cum photographer at Taj Mahal, has a number of children and therefore P.W.9's superior entrusted custody of the abandoned child to P.W.10 for safe custody and well being. As the abandoned child was having diarrhoea and having injuries, P.W.9 took him to Dr.Gulsesh for treatment. The abandoned child was in the custody of P.W.10 for nine days. The abandoned child use to stay with P.W.10 in his house during night and during day time the child will come with him to Taj Mahal. He could identify the clothes which the abandoned child was wearing on the day when he saw him. On 8.4.2001 P.W.1 and police from Chennai contacted him and P.W.1 showed the photograph of the abandoned child and identified the child in the custody of P.W.10 as his. When P.W.9 instructed P.W.10 to bring his son and asked P.W.1 as to whether he is the child, P.W.1 answered in the negative. When the abandoned child was shown, Sub Inspector of Police, Chennai informed P.W.9 that already a crime had been registered for kidnapping the child. P.W.9 found out the child's name as Kirankumar and after getting prior permission from the higher ups and making an entry in the general diary P.W.9 handed over custody of the child to P.W.1 and the Sub Inspector of Police. He was examined by the police. P.W.10 is working as a guide-cum-photographer in Taj Mahal Complex. At 7.00 p.m. on 31.3.2001 the police found an abandoned child in Taj Mahal campus. The young child had passed on stools in his pants and he was in a bad condition. P.W.10 cleaned his dress. However he was not at the place when the police noted the abandoned child and took him into their custody. On that night itself, the child was handed over to him

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for safe custody and well being. P.W.10 was instructed to bring the child every day to Taj Mahal and during night time to keep the child in his house. P.W.10 identified the clothes found on the abandoned child. With P.W.10, the abandoned child stayed for five or six days. P.W.10 was instructed to bring the child every day to Taj Mahal with the hope that one day or the other their parents would come so that the child could be handed over. He was examined by the Chennai police.

6. P.W.12 sent the accused for judicial remand and the case properties to the court. Ex.P.11 is the requisition given by him to the court. P.W.13 succeeded P.W.12, who verified the investigation already done by P.W.12. Then after completing all the legal formalities he filed the final report in court against the accused as referred to earlier. When the accused was questioned under Section 313 of the Code of Criminal Procedure on the basis of the incriminating materials made available against him, he denied each and every circumstance put up against him as false and contrary to facts. As already stated, neither oral nor documentary evidence was brought before court at his instance. Mr.A.S.Chakravarthy, learned counsel appearing for the appellant would contend that assuming the entire facts placed by the prosecution are true, even then the necessary ingredient of Section 364 A of the Indian Penal Code is not established. He elaborated his submission by stating that admittedly the child survived. Therefore the prosecution to sustain the conviction under Section 364A I.P.C. should establish that "hurt" was caused to the victim or the accused by his conduct had given rise to a reasonable apprehension that such person may be put to death or hurt. P.W.1 in this case no where states that his son Kirankumar had received any "hurt" or due to kidnapping of his son, P.W.1 had entertained a reasonable apprehension in his mind that "hurt" would be caused to his son. Since this evidence is admittedly not on record, the conviction of the accused under Section 364 A I.P.C. cannot be legally sustained. In this context, learned counsel would submit that there is no legal evidence to show that the child had received any hurt during the time, the child was detained by the accused. The arrest of the accused leading to the discovery of the place where the child was abandoned, is also doubtful. Mr.N.R.Elango, learned Additional Public Prosecutor in meeting the first point namely, absence of necessary ingredient of Section 364A I.P.C, would invite our attention to Section 319 of the Indian Penal Code, which defines the word "hurt". According to the definition, who ever causes bodily pain, disease or infirmity to any person is stated to cause hurt. By showing Concise Oxford English Dictionary, learned Additional Public Prosecutor took us through the meaning given to the word "infirmity". In the the 11th edition of Concise Oxford English Dictionary at page 728 "infirmity" is defined to mean physical or mental weakness. In this case the evidence of P.W.10 shows that the child was awfully sick when his custody was given to him. In addition to that, the evidence of P.W.9 shows that he found some blackened wounds on the person of the child. Therefore it would satisfy the ingredient of Section 364A of the Indian Penal Code. As far as the act of kidnapping and making a demand for ransom, learned Additional Public Prosecutor contended that there is no

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reason at all as to why P.W.1's evidence should be disbelieved . There is also overwhelming evidence to show that the accused was employed under P.W.1.

7. In the light of the arguments advanced by the learned counsel on either side, we went through the entire records. P.W.1 is the father of the male child by name Kirankumar, who was aged 2 1/2 years. There is not only the primary evidence of P.W.1 that the accused was employed under him but there is also overwhelming evidence of the other witnesses, who speak about the fact that the accused was employed under P.W.1. In other words, the prosecution definitely established that the accused was employed under P.W.1. P.W.1 would state that the accused had gained his trust and confidence by showing a good turn over in the work. The evidence shows that the accused left on 17.3.2001 taking a sum of Rs.7,000/- from P.W.1 to see his ailing mother and returned on 20.3.2001. The evidence also shows that feeling annoyed that he had not brought anything for the child from Madurai, the accused telling P.W.1 that he will take the child to a near by shop to get biscuits for him, took him out. Thereafter the child and the accused were not to be seen at all. There is consistent and cogent evidence in this case that the accused was seen going with the child around noon time on 20.3.2001 and thereafter the child was not to be seen at all. Thereafter the accused had made more than a couple of telephone calls and in piecemeal spread over a few days he informed P.W.1 that the child was in his custody; that he wanted a sum of Rs.50,000/- to meet his urgent need; that the money should be brought before 6.00 p.m. on 7.4.2001 near the Fort at Vellore and that driver Nagaraj in the Ambulance must bring the money. P.W.1 had passed on this information to the police, who had acted quickly to form a special team and making the necessary arrangements to lay the trap. The police team followed Nagaraj and when the accused went to see the Nagaraj at 6.00 p.m, the police swooped on him and caught him. The sequence of events as spoken to by the witnesses and police, unerringly establishes the involvement of the accused in kidnapping the child and making a demand for ransom. A disclosure is made by the accused at the time of his arrest that he had abandoned the child at Taj Mahal, Agra on 31.3.2001 and again the police moved into action very quickly by contacting higher police officials at Agra and ultimately they got the child from Taj Mahal. P.W.9 is the Sub Inspector of Police, Law and Order,Agra, who had given a graphic account of how he came to locate the abandoned child first on 31.3.2001 sleeping in the bench at Taj Mahal Complex; handing over custody of the child to P.W.9 under his superior's orders and then handing over custody of the child to P.W.1 and P.W.11, the Sub Inspector of Police when they reached Agra. Therefore we have no doubt at all that the prosecution by placing the relevant material evidence established all aspects of their case. It may be noticed here that P.W.9 had given evidence that on he finding the abandoned child at 7.00 p.m. on 31.3.2001 he found the child having passed stools in the Trouser itself. In addition to that he found that the child was having Diarrhea. He also found some blackened wounds on his body. P.W.10 would also state that when the child,s condition was awfully bad.

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8. Of course as contended by the learned counsel for the appellant P.W.1 no where states either in the complaint or in his evidence that his child had suffered hurt at the hands of the accused during the child's detention with him. It is natural because on the day when the child was taken from his custody, the child was hale and healthy and therefore there was no chance for P.W.1 to mention the above aspect in the complaint. The child was given back to him on 8.4.2001 at Agra. P.W.9's evidence is that noticing the pitiable condition of the child, he took him to his Doctor by name Gulsesh and got the child treated. He had also stated in his evidence in cross that Dr.Gulsesh is his family doctor and therefore he did not obtain any medical certificate. It must also be noticed that when P.W.9 took the child for treatment he did not know that an offence had been committed against the child and therefore in anticipation of a case before court, he must collect the medical records. The evidence of P.W.9 is so very natural and convincing we see no reason at all to doubt his evidence that he noticed blackened wounds injuries on the child and the child was also suffering from diarrhoea. We have already noted that P.W.10 in his evidence had stated that when custody of the child was given to him, the child was looking awfully bad. It must be noticed that the child was 2 1/2 years on the day when he was kidnapped from his father P.W.1.

9. As rightly contended by the learned Additional Public Prosecutor for the State, even in the absence of medical evidence, this court can safely conclude that the child has suffered hurt during his detention with the accused. We have already noted earlier in this judgment the definition for "hurt", which includes causing an infirmity to a person. We have also noted the meaning of the word "infirmity" as given in Concise Oxford English Dictionary. "Infirmity" means physical or mental weakness. For mental weakness there cannot be any medical certificate and therefore whether a person had suffered mental weakness or not depends upon the assessment of the person, before whom or to whose custody the child goes. In this case, P.W.10 had taken custody of the child on the night of 31.3.2001 itself and his assessment is that the child was awfully bad. The child appears to have been completely exhausted. From Chennai the child had been taken to Agra, which is at a far away distance. Therefore the child's condition deteriorating cannot be ignored. P.W.9's evidence shows that the child was suffering from Diarrhoea and he noticed wounds on stomach and face. Therefore there cannot be any difficulty at all in holding that the accused had definitely caused hurt to the victim in this case. It must be noted that the victim was admittedly 2 1/2 years on the day when it was kidnapped and therefore the court can definitely visualise the physical and mental weakness to which this unfortunate child should have been stretched. Therefore the facts stare at the face of the accused and he cannot escape from the conviction imposed by the learned Sessions Judge.

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10. For all the reasons stated above, we find that there is no infirmity in the judgment under challenge and accordingly it is sustained and the appeal is dismissed.

Tr/

Sd/-
Asst. Registrar

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Sub Asst.Registrar

To

1. The Additional Sessions Judge, Fast Track Court No.V, Chennai.

2. -do- Through the Principal Sessions Judge, Chennai.

3. The District Collector, Chennai.

4. The Director General of Police,Chennai.

5. The Public Prosecutor, High Court, Chennai-104.

6. The Superintendent, Central Prison, Vellore.

7. The Inspector of Police, K.1, Sembium Police Station, Chennai.

GM (CO)
RSM/13.9.2006

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